

Respondent requests review of the ALJ's Order arguing the ALJ denied respondent due process by failing to leave the record open for additional evidence despite statements

during the preliminary hearing that he would do so for a limited period of time. Respondent argues that the case should be remanded to the ALJ for consideration of the affidavit of Carol George, which was previously submitted.

Claimant argues that the Order should be affirmed. Claimant contends temporary total disability is not an issue over which the Board takes jurisdiction on an appeal from a preliminary hearing order, and this is an attempt by respondent to circumvent this rule by claiming denial of due process.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes that respondent's appeal of the preliminary hearing Order should be dismissed.

This matter went to preliminary hearing on November 20, 2012, before ALJ John D. Clark, sitting in place of ALJ Nelsonna Potts Barnes. The substitution of the ALJ was not disputed by the parties. Claimant requested ongoing medical treatment and TTD beginning on August 18, 2012, and continuing until October 4, 2012, when claimant was released to return to work by one of the treating physicians, John P. Estivo, D.O.

Claimant's entitlement to TTD was compromised by the fact she was terminated by respondent on August 18, 2012, after respondent determined she was absent from work without properly filling out the required FMLA papers. At the preliminary hearing, respondent requested additional time to submit an affidavit from a respondent employee detailing the events leading to claimant's termination. The ALJ granted respondent's request allowing additional time, but only until noon on the day after the preliminary hearing.

However, at 8:23 a.m. on November 21, 2012, the day after the preliminary hearing, respondent received the preliminary hearing Order from the ALJ granting claimant's request for TTD. Respondent had not yet provided the ALJ with the employee affidavit earlier discussed. At 10:57 a.m., respondent submitted by fax, an affidavit from respondent's administrator, Carol George, detailing the events leading up to the termination for cause of claimant. At 2:00 p.m., Sandi Peck, legal assistant for ALJ Clark, faxed respondent a second Order which appears to be identical to the one provided at 8:23 a.m. The second Order does not indicate what, if any, additional evidence or information was considered prior to its transmittal. However, it is clear from the information submitted into this record by respondent, the ALJ had the affidavit in his possession when the second order was transmitted to the parties. The record does not detail how much, if any, consideration was given by the ALJ to the affidavit. Respondent contends it was denied due process due to the ALJ's failure to properly consider all of the submitted evidence, i.e., the affidavit.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

K.S.A. 2011 Supp. 44-534a(2) states in part:

A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2011 Supp. 44-551(i)(2)(A) states:

(2) (A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

Respondent contends its due process rights were violated when the ALJ issued the original Order at 8:23 a.m. without allowing respondent the opportunity to provide the earlier offered affidavit regarding claimant's termination. The Board has previously found that an action by the ALJ which constituted a denial of due process exceeded the ALJ's jurisdiction under K.S.A. 44-551.³ As the language of K.S.A. 44-551(i)(2)(A) was not changed with the enactment of the May 15, 2011, revised workers compensation act, the position of the Board on this issue remains the same. This Board Member will therefore determine whether the ALJ exceeded his jurisdiction in issuing the appealed Order.

¹ K.S.A. 2011 Supp. 44-501b and K.S.A. 2011 Supp. 44-508(h).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ *Saffer v. Star Construction, Inc.*, No. 1,030,669, 2009 WL 3191382 (Kan. WCAB Sept. 30, 2009).

K.S.A. 2011 Supp 44-510c(b)(2)(C) states:

(C) If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

Respondent contends claimant is not entitled to TTD as she was terminated for cause after failing to fill out the necessary FMLA papers before leaving the country. The affidavit supporting respondent's position was provided, with the ALJ's permission, the morning after the preliminary hearing. However, the ALJ had already issued the preliminary Order. Respondent contends its due process rights were violated with the premature issuance of the order.

"The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case."⁴

For an administrative body to determine the existence or nonexistence of facts, it must first actually review and consider those facts. It is clear from this record the ALJ did not review the affidavit of Carol George, respondent's administrator, prior to issuing the Order at 8:23 a.m.

However, the affidavit was then provided to the ALJ and a separate order issued at 2:00 p.m. that same day. Respondent argues the ALJ did not consider the affidavit, as the second order was identical to the first.

No particular form of proceeding is required to constitute due process in administrative proceedings; all that is required is that the liberty and property of the citizen be protected by rudimentary requirements of fair play. Its requirements include the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason; and its essential requirements are met where the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made.

Denial of due process occurs where the exercise of power by an administrative officer or body is arbitrary or capricious, where a decision of a board or commission

⁴ Collins v. Kansas Milling Co., 207 Kan. 617, 485 P.2d 1343 (1971).

is based on mere guesswork as to an essential element, or where a finding is unsupported by any evidence.⁵

Here, the original actions by the ALJ in issuing an order prematurely, would constitute a denial of respondent's due process. However, respondent then provided the affidavit originally contemplated and a second order was issued. It is acknowledged the second order was identical to the first. But it was issued after the ALJ received the evidence in question. How much time and effort was expended by the ALJ in reviewing that evidence is undeterminable. Neither this Board Member nor either attorney has the ability to crawl into the mind of the ALJ and determine his thought process leading to the issuance of the second decision. However, what is clear is the offered evidence was available for his review when the second order was issued. Respondent's due process rights may have been violated with the first order, but not with the second.

Respondent's objection to the TTD order is only reviewable based upon the due process dispute. The Board has no jurisdiction over a preliminary hearing order for TTD if none of the jurisdictional issues listed in K.S.A. 2011 Supp. 44-534a is raised. Beyond the due process dispute, no other jurisdictional issue remains for the Board's consideration. Therefore, with the determination of the due process issue, the only remaining action available to this Board Member is to dismiss the appeal.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The second Order of the ALJ was made after respondent was given the opportunity to submit its affidavit evidence regarding claimant's entitlement to TTD. Respondent's due process rights were properly protected in this instance. No other issue remains for the Board's consideration and respondent's appeal is dismissed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated November 21, 2012, remains in full force and effect and respondent's appeal is dismissed.

⁵ 73 C.J.S. *Public Administrative Law and Procedure*, § 59; See also *Johnston Coal & Coke Co. v. Dishong*, 198 Md. 467, Syl. ¶ 5, 84 A. 2d 847 (1951).

⁶ K.S.A. 2011 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: James A. Cline, Attorney for Claimant
pflores@renderkamas.com
jccline@renderkamas.com

William L. Townsley, Attorney for Respondent and its Insurance Carrier
wtownsley@fleeson.com
pwilson@fleeson.com

John D. Clark, Administrative Law Judge